SUPREME COURT, U. S.

No. 293

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JOHN F. DAVIS, CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

FIORE BUCCIERI, FRANK BUCCIERI, CHRIS CARDI, DOMINICK CARZOLI, ARTHUR COWAN, JOSEPH GAGLIANO, JOSEPH GRIECO, PETER ORI, LENNY PATRICK, ALBERT SARNO, PATSY RICCIARDI and ANTHONY SPILOTRO,

Petitioners,

VS.

ILLINOIS CRIME INVESTIGATING COMMISSION,

Respondent.

On Petition For A Writ of Certiorari to the Supreme Court Of Illinois.

PETITION FOR A WRIT OF CERTIORARI

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PETITION FOR A WRIT OF CERTIORARI

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Illinois entered in the above entitled cause on January 19, 1967.

Citations to Opinion Below

The opinion of the Supreme Court of Illinois is printed in Appendix A hereto, *infra,* App. p. 1, and is reported at 224 N.E.2d 236.

Jurisdiction

The judgment of the Supreme Court of Illinois was entered on January 19, 1967. A timely Petition for rehearing was denied by that Court on March 28, 1967. The jurisdiction of this Court is invoked under Title 28, §1257(3), U.S.C.

Questions Presented For Review

1. Whether the Due Process Clause of the Fourteenth Amendment to the Constitution requires an express provision for notice and hearing in a statute purporting to authorize a legislative investigating commission to seek an enforcement order, from a court, compelling the attendance and testimony of witnesses before the commission.

2. Whether notice of an action to seek such an enforcement order mailed by ordinary mail to each of the petitioners satisfied the requirements of due process of law.

3. Whether the refusal to grant petitioners a hearing on the merits of respondent's application for an enforcement order denied petitioners due process of law.

Constitutional Provision and Statutes Involved

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> • • • No State shall • • • deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 13 of the Illinois Crime Investigating Commission Act, (Ill.Rev.Stat., 1965, Ch. 38, §203-13), provides in pertinent part:

"* * * In case of disobedience to a subpoena, the Commission may invoke the aid of any circuit court of the State in requiring the attendance and testimony of witnesses, and the production of documentary evidence. Any circuit court of the State may, in case of contumacy or refusal to obey a subpoena issued to any person, issue an order requiring such person to appear before the Commission, or to produce documentary evidence, if so ordered, or to give testimony touching the matter in question, and any failure to obey such order of the circuit court may be punished by that court as a contempt upon itself. * * *"

Illinois Revised Statutes, 1965, Chapter 63, Section 13.2 provides:

> No person shall be required to testify at a hearing unless two members of the commission are present. No person shall be required to appear at any hearing or testify unless he has been personally served with (a) a copy of this Act and (b) a copy of the law or resolution authorizing the investigation.

Statement of the Case

The action challenged herein was initiated on behalf of the Respondent, by the Attorney General of Illinois, in the Circuit Court of Cook County by the filing of the following "Petition:"[1]

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[1] The Petition contained fifteen counts, each count being directed to an individually named "Defendant." The several counts were identical, with the single exception that each count had appended thereto, as an exhibit, a copy of the "subpoena" allegedly served upon the "Defendant" named therein and a copy of a communication allegedly addressed to the Commission or its Executive Director on behalf of the named "Defendant" following his alleged receipt of the "subpoena." Three "Defendants" did not appear in the Supreme Court of Illinois, and do not appear here.

"Comes now the plaintiff, the Illinois Crime Investigating Commission (hereinafter referred to as the 'Commission'), of the State of Illinois, by William G. Clark, Attorney General of the State of Illinois, its attorney, and complains of the defendants, Fiore Buccieri, Frank Buccieri, Mitchell Caplan, Chris Cardi, Dominick Carzoli, Arthur Cowan, Joseph Gagliano, Joseph Grieco, John Lang, Robert J. McDonnell, Peter Ori, Lenny Patrick, Patsy Ricciardi, Albert Sarno, and Anthony Spilotro, and each of them, individually and collectively, for the following reasons:

Count 1

As to Defendant Fiore Buccieri

"1. That the plaintiff, the Commission herein, was created by an act of the General Assembly of the State of Illinois, approved June 20, 1963, with the powers and duties provided for in Chapter 38, Sections 203-1 through and including 203-17, entitled Illinois Crime Investigating Commission Act (hereafter referred to as the 'Act'), Illinois Revised Statutes, 1965, Volume 1, pages 1666-1668.

"2. That the legislative intent, relative to said Act is set out in Section 1 (Section 203-1) of said Act, and is as follows:

> 'It is the intent of the General Assembly, recognizing the frequent subversion of governmental, political and economic institutions through the influence of organized crime, (a) to set up adequate facilities for investigating and establishing the facts and general background relating to organized crime and to individual crimes insofar as they have a bearing on organized crime, whether the act or intent constituting the same, or both, occurs within or without the State so long as such organized crime or individual crimes affect the public safety, public peace,

public health, public morals, public welfare or public justice of the State; (b) to evaluate the extent to which organized crime exists within the borders of the State, and the degree of efficiency of law enforcement agencies in dealing with it; and (c) to make such facts, general background and evaluation available to the legislative, executive, judicial and administrative bodies and officials of the State, to the end that they may better perform their respective functions in preserving the public safety, public peace, public health, public morals, public welfare and public justice of the State.

'This Act, and the jurisdiction of the Commission created thereby, is not intended to be in derogation of the jurisdiction of any County of the State.'

"3. That pursuant to the provisions of said Act, and particularly Sections 1, 7, 9, 10, and 12 thereof, but not in limitation of same, the Commission did, on to wit November 17, 1965, by a certain "Specific Resolution No. 8" resolve to conduct hearings relative to the subject or subjects specified in said resolution, copy of which said resolution is hereunto attached as Exhibit A of this count, and made a part hereof.

"4. That pursuant to said Act, particularly, Section 13, and said Resolution, a subpoena was duly served upon the defendant, complained of in this count, copy of which said subpoena is attached hereto as Exhibit B of this count, and made a part hereof, to which said subpoena was attached a copy of the Resolution heretofore referred to as Exhibit A, and also attached to said subpoena was a copy of the "Hearings Before Commissions" Act, being Sections 13.1 through 13.5 of Chapter 63, Illinois Revised Statutes, 1965, Volume 2, pages 338-339, copy of which said Act is attached hereto as Exhibit C of this count, and made a part hereof. That said subpoena was duly served upon this defendant, personally, on the date indi-

cated on said subpoena (Exhibit B of this count), requiring the said defendant to appear at the time and place indicated on said subpoena.

"5. That at the time and place indicated in said subpoena, the plaintiff was conducting a public hearing, pursuant to the provisions of the Illinois Crime Investigating Commission Act, Illinois Crime Investigating Commission Specific Resolution No. 8 (Exhibit A of this count), and the "Hearings Before Commissions" Act (Exhibit C of this count). That at said time and place, the Commission was in session, conducting said hearing and was prepared to question said defendant, and did in fact call said defendant, but said defendant did not appear as a witness, nor did said witness testify, as more fully appears in the next paragraph of this count.

"6. That, in fact, the said defendant not only did not appear as a witness, but said defendant did not even appear at said hearing, but through an attorney, said attorney, on behalf of said defendant, filed a certain supposed document with said Commission, which said document has no legal effect, but nevertheless, a copy of said document is attached hereto as Exhibit D.

"7. That the above mentioned subpoena was issued and served upon this defendant pursuant to the provisions of Section 13 of said Act, which said Section also provides that:

> 'In case of disobedience to a subpoena, the Commission may invoke the aid of any circuit court of the State in requiring the attendance and testimony of witnesses, and the production of documentary evidence. Any circuit court of the State may, in case of contumacy or refusal to obey a subpoena issued to any person, issue an order requiring such person to appear before the Commission, or to produce documen-

tary evidence, if so ordered, or to give evidence touching the matter in question, and any failure to obey such order of the circuit court may be punished by that court as a contempt upon itself.'

"Wherefore, this defendant, having disobeyed the subpoena of this Commission, it is hereby petitioned by the said Commission that this Court enter an order herein, requiring this defendant to appear before this Commission and to be sworn to answer questions, and to answer all proper questions, at a time and place to be determined by the Court or said Commission.

* * *

"Wherefore, these defendants, and each of them above enumerated in Counts 1 through 15 inclusive, having each disobeyed the subpoena of this Commission, it is hereby petitioned by said Commission, that this Court enter an order herein, requiring these defendants and each of them to appear before this Commission and to be sworn to answer questions, and to answer all proper questions, at a time and place to be determined by the Court or said Commission." (Tr. 3-11)

Notice of the filing of this "Petition" was sent to the Appellants and their attorneys by ordinary mail.

The "Defendants" appeared by counsel and filed the following "Motion To Dismiss Action and Strike Complaint:"

"Come now the following defendants hereto, by their respective Counsel, as indicated:

Fiore Buccieri, by McDonnell and McDonnell, his Attorney;

Frank Buccieri, by John Muldoon, his Attorney;

Chris Cardi and Peter Ori, by John Cogan, their Attorney;

Dominick Carzoli, Albert Sarno and Anthony Spilotro, by Frank G. Whalen, their Attorney;

Arthur Cowan and Lenny Patrick, by John Powers Crowley, their Attorney;

Joseph Gagliano, by Harry J. Busch, his Attorney;

Joseph Grieco, by Bernard McDonnell and Eugene Bernstein, his Attorneys; and

Patsy Ricciardi, by Frank Oliver, his Attorney.

"Said defendants, pursuant to the provisions of Section 45 of the Illinois Civil Practice Act (S.H.A. Chapter 110, Section 45), file and present their objections to the pleading of the plaintiff, and state that said pleading is substantially insufficient in law for the reasons hereinafter set forth.

"Said defendants hereby move:

(a) That the plaintiff's complaint be dismissed; and

(b) In the event of the denial of the motion expressed in sub-paragraph (a), without waiver of said motion, that plaintiff's complaint be stricken.

"As grounds for the motions hereinabove expressed, these defendants show:

"1. The statute cited by plaintiff as its authority for the presentation of its complaint within paragraph 7 of each Count thereof, being Section 13 of the Illinois Crime Investigating Commission Act (S.H.A. Chapter 38, Section 203.13) is offensive to the Constitution of the United States and to the Constitution of the State of Illinois in the following respects:

"(a) Said statute purports to authorize the use of court process for the imposition of obligations upon these defendants, while making no provision for notice to these

defendants. Such procedure constitutes a deprivation of substantial right without due process of law, contrary to the provisions of the 14th Amendment to the Constitution of the United States and further contrary to the provisions of Article II, Section 2 of the Constitution of Illinois 1870.

"(b) Said statute further serves to deny these defendants due process of law, contrary to the Constitutional provisions above cited, and to deny these defendants the equal protection of the laws, contrary to the 14th Amendment to the Constitution of the United States, in that it purports to empower the plaintiff arbitrarily to designate persons as to whom normal judicial procedures and safeguards will not apply.

"(c) Said statute is further offensive to the Federal Constitutional provisions above cited and to Article VI, Sections 1 and 2 of the Constitution of Illinois 1870 in that it purports to impart to the plaintiff a directory power over this Court; to relegate this court to the status of an "aid" to the plaintiff; and to deprive the persons sought to be affected by the orders of this Court of standing equal to that of the plaintiff before this Court.

* * *

In due time, the cause came on for hearing on the Motion To Dismiss filed by the "Defendants." Following arguments on behalf of the "Plaintiff" and the "Defendants," the lower court found that it had jurisdiction over the persons of the defendants and over the subject matter, and it ordered:

> "* * * that the Motion to Dismiss Action And Strike Complaint heretofore filed herein on behalf of twelve of the fifteen defendants, be and is hereby overruled and denied.

"It Is Further Ordered that each and everyone of the defendants * * * appear and attend before the Illinois Crime Investigating Commission, plaintiff herein, on Wednesday, April 6, A.D. 1966, at 10:00 A.M. at the Cook County Board Hearing Room, being Room 535 of the County Building, 118 North Clark Street, Chicago, Cook County, Illinois, and from day to day thereafter, until such time as each is excused by the said Commission.

"The Court hereby retains jurisdiction over this cause.

"The Court denies the motion of the Defendants for leave to file an Answer to the Petition of the Plaintiff." (Tr. 88-89)

A "Joint Notice of Appeal" was duly filed, (Tr. 91-92), and thereafter, on March 9, 1966, an appeal bond, staying the proceedings below, was fixed and filed on behalf of each appellant. (Tr. 109)

The Supreme Court of Illinois ruled:

1. That " * * * notice and an opportunity to be heard are essential elements of due process of law," (App. 1, *infra,* p. 2) but that based upon "* * * fundamental rules of statutory construction as laid down by this court from time to time * * * as well as commonplace knowledge that notice and opportunity to be heard are the essence of procedural due process, we hold that the legislature, in enacting section 13, necessarily contemplated and intended that orders to compel obedience to subpoenas issued by the commission could only be entered upon due notice and hearing." (App. 1, *infra,* pp. 3-4).

2. That "While it would appear there is authority from which analogy could be drawn to uphold the validity of mailed notice in a proceeding such as this, * * * we do not reach that point in this case. By making a general appearance, defendants submitted to the jurisdiction of the court and waived the adequacy of the notice served upon them." (App. 1, *infra,* p. 4).

3. " * * * [J]udicial review [of administrative subpoenas] is limited to a consideration of the constitutionality of the statute, whether the contemplated agency proceedings are included within the statutory authority, the reasonableness of the demand and the relevance of the information sought," (App. 1, *infra,* p. 5), and that matters of defense, such as the legality of the investigation based on the claim that the commission was seeking to expose solely for the sake of exposure, should have been raised in the motion to dismiss the "petition" and was not a matter to be raised by answer. "Due process does not require that a party be given multiple opportunities to raise the same question, and when all matters properly reviewable may be raised and heard on a motion to dismiss, there exists no necessity for further pleadings. Defendants' failure to present all reviewable issues in its motion constituted a waiver of those not presented * * * *" (App. 1, *infra,* p. 5-9).

REASONS FOR GRANTING THE WRIT

1. The lack of a statutory provision for notice and an opportunity to be heard.

The action[1] below was commenced pursuant to Section 203-13 of the Illinois Criminal Code, (Ill.Rev.Stat., 1965, Ch. 38, §203-13), which, in pertinent part, provides:

> "* * * In case of disobedience to a subpoena, the Commission may invoke the aid of any circuit court of the State in requiring the attendance and testimony of witnesses, and the production of documentary evidence. Any circuit court of the State may, in case of contumacy or refusal to obey a subpoena issued to any person, issue an order requiring such person to appear before the Commission, or to produce documentary evidence, if so ordered, or to give testimony touching the matter in question, and any failure to obey such order of the circuit court may be punished by that court as a contempt upon itself. * * *"

The statute does not contain any provision affording notice or an opportunity to be heard to the person against whom the directory order is sought. The statute, on its face, contemplates an *ex parte* application to and proceeding before "any circuit court of the State." The question presented is thus whether the failure to expressly provide for notice and an opportunity to be heard exposes the statute to the objection that it denies a putative witness due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

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[1] The instant proceeding can be characterized as an "action" only to the extent that one party filed a "petition" in a court of record, and obtained an order thereon which adversely affects the rights of the petitioners herein.

Illinois recognizes that notice and the opportunity to be heard are not only essential elements of due process, (*People* v. *Lavendowski,* 329 Ill. 223; *People* v. *Marquis,* 291 Ill. 121; *People* v. *Gale,* 339 Ill. 162; see also, *Simon* v. *Craft,* 182 U.S. 427), but are actually the essence of "procedural due process." See, *Coe* v. *Armour Fertilizer Works,* 237 U.S. 413; *Southern Ry. Co.* v. *Virginia ex rel. Shirley,* 290 U.S. 190; App. I, *infra,* p. 2. Thus, an individual's rights may not be determined, his liabilities may not be adjudicated, without at least a hearing or an opportunity to be heard. *Coe* v. *Armour Fertilizer Works,* 237 U.S. 413, 423; *Southern Ry. Co.* v. *Virginia ex rel. Shirley,* 290 U.S. 190. A statute which assumes to provide for the adjudication of an individual's rights or liabilities must contain provisions for notice and an opportunity to be heard. *Coe* v. *Armour Fertilizer Works,* 237 U.S. 413; *Southern Ry. Co.* v. *Virginia ex rel. Shirley,* 290 U.S. 190; *Stuart* v. *Palmer,* 74 N.Y. 183.

The absence of an express provision for notice and an opportunity to be heard has been construed as a violation of due process because

> "The constitutional validity of a law is to be tested, not by what has been done under it, but by what may, by its authority, be done." *Stuart* v. *Palmer,* 74 N.Y. 183, 188.

Formerly, Illinois had held to this point of view. *People* v. *Marquis,* 291 Ill. 191; *People* v. *Gale,* 339 Ill. 162. For the first time, in this case, Illinois has read a provision calling for notice and an opportunity to be heard into a statute where nothing in that statute suggests that the legislature intended that result. The Due Process Clause would seem to require either an express provision or something from which such a provision could be reasonably

inferred. See, *Coe* v. *Armour Fertilizer Works,* 237 U.S. 413, 424-25; *Stuart* v. *Palmer,* 74 N.Y. 183, 188. Certiorari should be granted herein to determine whether such provisions can be read into the statute where nothing therein suggests that the legislature so intended.

2. The Sufficiency of Mailed Notice.

Reading a requirement of notice into a statute where it does not otherwise appear, creates a multitude of problems. What type of notice was intended by the legislature when they have been silent on the subject? Is notice by registered mail sufficient? Is personal service of notice required? See, *e.g., Chicago & Alton Ry.* v. *Smith,* 78 Ill. 96, 99. What about substituted service? Generally, Illinois holds that where no valid reason exists why personal service of notice cannot be made, constitutional notice can only be given by personal service. *Chicago & Alton Ry.* v. *Smith,* 78 Ill. 96; *cf. People* v. *Simon,* 176 Ill. 165, 52 N.E. 910, 914; Compare, *Jacobs* v. *Roberts,* 223 U.S. 261; *Pennoyer* v. *Neff,* 95 U.S. 714, 726-27. Thus, even if it is proper to read a provision for notice and hearing into this section of the Illinois Crime Investigating Commission Act, the problem remains whether the notice[2] that was given to the Appellants by ordinary mail was constitutionally sufficient.

The Supreme Court of Illinois held that Petitioners waived any possible objection to the method of service by their general appearances and refused to consider the issue. This disposition overlooks the nature of Petitioners' entry into the case. Petitioners alleged that the entire proceeding was unconstitutional, that the lower court did not and

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[2] The notice referred to here is the actual securing of personal jurisdiction over petitioners.

could not have jurisdiction of their persons because of that constitutional infirmity. Their specific allegations of unconstitutionality was based on the absence of a provision in the statute for bringing them into court in the first instance. *Cf. Mitchell* v. *Jacobs,* 17 Ill. 235. Under this circumstance, the issue of the propriety of mailed notices should have been reached.

Insofar as the decision of the Illinois Supreme Court seems to give approval to service by ordinary mail, that decision represents a grave departure from settled principles of procedural due process. Compare, *Pennoyer* v. *Neff,* 95 U.S. 714. The cases on which the Illinois Court bases its *dicta* are clearly distinguishable, and the distinguishing factor highlights the importance of an authoritative determination as to the type of service permissible under the Constitution in cases such as this. Both *Cudahy Packing Co.* v. *National Labor Relations Board,* 117 F.2d 692, and *Goodyear Tire & Rubber Co.* v. *National Labor Relations Board,* 122 F.2d 450, involved enforcement proceedings arising out of matters pending before an administrative agency. The parties had appeared before the agency; they had joined issue on the merits of the questions before the agency; they had participated in its proceedings prior to the applications for the enforcement orders. The enforcement action was truly ancillary to the agency's proceedings. Here, however, Petitioners had not partaken in any proceedings before the Commission. The enforcement action was not ancillary to any proceedings before the Commission to which Petitioners were a part. The enforcement action here was the actual initiation of the proceeding before the Commission.

3. Denial of a Hearing.

Following denial of their motion to dismiss, the trial court ruled that Petitioners were not entitled to answer the Respondent's "petition" and denied them a hearing on the factual issues asserted by the "petition." The Supreme Court of Illinois ruled, as stated above, that Petitioners were entitled to a hearing only as to "a consideration of the constitutionality of the statute, whether the contemplated agency proceedings are included within the statutory authority, the reasonableness of the demand and the relevance of the information sought." (App. I, *infra*, p. 5.) The Court did not rule directly on Petitioners' contention that the action of the trial court foreclosed them from challenging Respondent's assertion that they were in fact the persons named in the subpoenas and that they had in fact been served with the subpoenas in accordance with law.[3] The holding of the Illinois Supreme Court thus denies persons against whom enforcement proceedings are initiated the right to be heard in their claim that the subpoenas to be enforced do not meet with mandatory standards previously established by the Illinois legislature, or embodied within the common law. In short, because a putative witness is not entitled to a hearing on these issues according to the decision here sought to be reviewed, an individual is not entitled to claim that he is not the person named in or served with a sub-

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[3] Illinois law requires that a subpoena issued by the Commission and served upon a prospective witness be accompanied by a copy of the resolution authorizing the investigation to which the witness has been subpoenaed, and a copy of the statute itself, which describes many other rights and privileges of such witnesses. (Ill.Rev.Stat., 1965, ch. 63, sec. 13.2) Illinois law further provides that witnesses so subpoenaed be paid "witness fees" in advance. Ill.Rev.Stat., 1965, Ch. 63, sec. 6; *Bonner* v. *People,* 40 Ill. App. 628; *People* v. *Healey,* 139 Ill. App. 363.

poena in the first instance, that the subpoena was not accompanied by those documents which it is required by law to be accompanied by, or that he has not been tendered the required witness fees. These portions of the "petition" alleging facts to this effect[4] must be taken as alleged. Petitioners, and others similarly situated, are not entitled to contest these allegations, or, at the very least, to have them affirmed, under oath, in open court, in the presence of Petitioners, where they may be tested by the traditional methods of cross examination. See, *Pointer* v. *Texas,* 380 U.S. 400; *Douglas* v. *Alabama,* 380 U.S. 415.

Conclusion

For the above and foregoing reasons we respectfully pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Illinois entered in this case.

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[4] The "petition" herein did not even allege that Petitioners had been tendered the required witness fees.

APPENDIX I

Opinion of the Supreme Court of Illinois

Docket No. 39957—Agenda 54—September, 1966.

Illinois Crime Investigating Commission, Appellee, v. Fiore Buccieri *et al.*, Appellants.

MR. JUSTICE UNDERWOOD delivered the opinion of the court:

This appeal from the circuit court of Cook County challenges the constitutionality of section 13 of the Illinois Crime Investigating Commission Act, (Ill. Rev. Stat. 1965, chap. 38, par. 203—13,) and the validity of certain actions of the commission under authority of the act.

On November 17, 1965, the commission adopted a resolution which, after first reciting purposes consistent with the legislative intent expressed in section 1 of the act, (par. 203—1,) resolved to conduct public hearings on January 12, 13 and 14, 1966, in the city of Chicago, to determine the extent to which organized criminal elements are involved in the "loan shark" or "juice" racket in Cook County. Two days later subpoenas were issued, as authorized by section 13, commanding the fifteen defendants to appear at a certain date, time and place to give testimony and to answer such questions as might be put to them. The subpoenas, together with copies of the commission's resolution, were served on defendants at various times during November and December, 1965. Defendants did not appear or testify in response to the subpoenas, but did, through counsel, notify the commission of their belief that the subpoenas were ineffective at law and of their intention not to appear.

Section 13 of the act provides in pertinent part: "In case of disobedience to a subpoena, the Commission may invoke

the aid of any circuit court of the State in requiring the attendance and testimony of witnesses, and the production of documentary evidence. Any circuit court of the State may, in case of contumacy or refusal to obey a subpoena issued to any person, issue an order requiring such person to appear before the Commission, or to produce documentary evidence, if so ordered, or to give evidence touching the matter in question, and any failure to obey such order of the circuit court may be punished by that court as a contempt upon itself." In accordance with this provision the commission, on January 20, 1966, filed a petition in the circuit court of Cook County naming each defendant in a separate count and praying for an order requiring defendants to obey the subpoenas. Notice of the filing of such petition was sent to defendants and their attorneys by mail. Thereafter, defendants appeared by their attorneys and collectively made a motion to strike and dismiss the petition. It is the order denying such motion and directing them to appear and attend before the commission from which this appeal has been prosecuted.

Basing their position on the fundamental and undeniable premise that notice and opportunity to be heard are essential elements of due process of law, (*People* v. *Lavendowski,* 329 Ill. 223; *Coe* v. *Armour Fertilizer Works,* 237 U.S. 413, 59 L. Ed. 1027,) it is the contention of defendants that the portion of section 13, heretofore quoted, violates due process because it fails in express terms to provide for notice and opportunity to be heard when the aid of a circuit court is sought to compel obedience to a *subpoena.* They recognize there was in fact notice and hearing in this case, but insist that the constitutionality of the section is to be tested not by what was done under it, but what may, by its authority, be done. See: *Stuart* v. *Palmer,* 74 N.Y. 183.

While the problem presented is not a new one, it does not appear to have received a uniform solution in this jurisdiction. In *Durkin* v. *Hey,* 376 Ill. 292, where a section of the Unemployment Compensation Act provided for an application to a circuit court for an order compelling the production of books or documents, we held the legislature must have contemplated notice and hearing, stating at page 298: "Otherwise, it would clearly violate the due process clause of both the State and Federal constitutions. We must assume that the legislature intended that such orders could only be entered upon due notice and hearing." Prior to that, in *People ex rel. Joyce* v. *Strassheim,* 242 Ill. 359, it was also implied that the parole law contemplated a hearing before the parole board not expressly provided for. On two other occasions, however, a different construction was made of statutes which failed to expressly provide for notice and hearing. In *People* v. *Marquis,* 291 Ill. 121, which involved a section of the Search and Seizure Act permitting the destruction of property seized, it was held that the failure of the statute to provide for notice to the persons whose rights and property were affected caused the section to violate due process of law. Reaching the same result was *People* v. *Gale,* 339 Ill. 162, where the court considered a section of the Motor Vehicle Act which permitted a judicial determination of the ownership of a vehicle without notice to all parties in interest. And although the defendants urge the result of the *Gale* and *Marquis* decisions upon us, it is our opinion that *Durkin* and *Strassheim* represent the proper view.

Under the fundamental rules of statutory construction as laid down by this court from time to time, it has long been held that it is our duty to construe acts of the legislature so as to uphold their constitutionality and validity if

it can reasonably be done, and, further, that if their construction is doubtful, the doubt will be resolved in favor of the validity of the law attacked. (*People* v. *Illinois Toll Highway Com.*, 3 Ill.2d 218; *People ex rel. Dolan* v. *Dusher*, 411 Ill. 535; *People* v. *Newcom*, 318 Ill. 188.) Complementary principles of equal force and stature are that the legislature is presumed to act in view of the constitution and not to intend a violation of its provisions or the enactment of a void law. (*Follett's Illinois Book and Supply Store, Inc.* v. *Isaacs*, 27 Ill.2d 600; *People ex rel. Bell* v. *New York Central Railroad Co.*, 10 Ill.2d 612.) Similarly, it will be presumed the legislature did not intend absurdity, inconvenience or injustice. (*Illinois National Bank* v. *Chegin*, 35 Ill.2d 375; *People ex rel. Barrett* v. *Thillens*, 400 Ill. 224.) Based upon these rules and principles, as well as the commonplace knowledge that notice and opportunity to be heard are the essence of procedural due process, we hold that the legislature, in enacting section 13, necessarily contemplated and intended that orders to compel obedience to subpoenas issued by the commission could only be entered upon due notice and hearing.

It is next contended by some of the defendants that the mailed notice of the hearing served upon them was inadequate, and suggested that only personal service would suffice to give the circuit court jurisdiction of their persons. While it would appear there is authority from which analogy could be drawn to uphold the validity of mailed notice in a proceeding such as this, (*cf. Cudahy Packing Co.* v. *National Labor Relations Board*, 117 F.2d 692; *Goodyear Tire & Rubber Co.* v. *National Labor Relations Board*, 122 F.2d 450,) we do not reach that point in this case. By making a general appearance, defendants submitted to the jurisdiction of the court and waived the adequacy of the notice served upon them. *Lord* v. *Hubert*, 12 Ill.2d 83, 87; *Kelly* v. *Brown*, 310 Ill. 319, 323-324.

Defendants also claim that the trial court should have allowed them to answer plaintiff's petition after their motion to dismiss was denied. This contention requires consideration of the question, new to this court, of the proper scope of judicial review of administrative subpoenas. This issue has frequently been before the Federal courts, and it is now there established that judicial review is limited to a consideration of the constitutionality of the statute, whether the contemplated agency proceedings are included within the statutory authority, the reasonableness of the demand and the relevance of the information sought. (*Oklahoma Press Pub. Co.* v. *Walling,* 327 U.S. 186, 90 L. Ed. 614; *Endicott Johnson Corp.* v. *Perkins,* 317 U.S. 501, 87 L. Ed. 424; *Adams* v. *FTC,* (8th cir.) 296 F.2d 861; *Crafts* v. *FTC,* (9th cir.) 244 F.2d 882.) Courts cannot consider whether the agency has probable cause for its proposed action, defenses on the merits of the administrative proceeding, or procedural irregularities. (*National Labor Relations Board* v. *C.C.C. Associates, Inc.,* (2d cir.) 306 F.2d 534.) Outside the Federal system the question has rarely arisen, but all the cases which we have found are consistent with the Federal view. (See e.g. *Application of Waterfront Com. of New York Harbor,* 160 A.2d 832 (N.J.); *In re Iowa State Commerce Com.,* 110 N.W.2d 390 (Iowa); *Rushmore* v. *Lipson,* 257 N.Y.S.2d 316; *Application of Dairyman's League Co-op Association, Inc.,* 84 N.Y.S.2d 745, affirmed 86 N.E.2d 509.) The soundness of the Federal cases is attested by the unanimity of opinion and the desirability of interfering with agency investigations only to the extent required by due process necessities. We share this view.

Of the matters raised by the defendants in their motion to dismiss, the court apparently considered it necessary to pass only on the issue of constitutionality of the investigation. While most of the other claims were clearly outside

the proper scope of judicial review, the motion to dismiss the enforcement petition included a three pronged attack upon the legislative authority of the commission to proceed in its investigation. It charged that the commission was without authority to investigate individual crimes; that it was without authority to investigate the " 'loan shark' or 'juice' racket"; and that the commission was without authority to act in the matter at all due to its failure to file its rules and resolution with the Secretary of State in the time and manner required by section 4 of the act pertaining to Rules and Regulations of State Agencies. (Ill. Rev. Stat. 1965, chap. 127, par. 266). It also questioned the reasonableness of the demand and relevance of the information sought on the ground that the subpoenas did not inform them before whom, or concerning or on behalf of whom, or about what defendants were expected to testify. Since these matters were all within the prevailing rule, herein adopted by us, delineating the boundaries of judicial inquiry, they should have been passed upon by the circuit court.

We believe, however, that no useful purpose would be served here by remanding the cause for a consideration of the remaining issues. There are no disputed factual issues involved. The complaint as to the insufficiency of the subpoenas is to be determined from those documents themselves, and they are before us. In short, the questions involved are as to legal effect and sufficiency, and these questions were presented to the trial court. While not ruled on by it, they were argued there by the defendants and briefed and argued by both parties here. Since defendants were unhampered by rulings limiting the scope of their presentations, we have the benefit of their research and suggestions in the trial court and here, and there would

appear to be no denial of due process or prejudice to any defendant under these circumstances by our consideration of the contentions presented but not ruled on by the trial judge. It is established judicial policy to avoid intervention in investigative agency proceedings, except as due process requirements may necessitate. This policy would seem to require as a corollary the expeditious disposition of litigation involving such agency proceedings so that the functioning of the agency will not be unduly delayed. We accordingly deem it expedient to determine these unresolved issues now. See Ill. Rev. Stat. 1965, chap. 110, par. 92(1)(e).

The alleged lack of authority of the commission to investigate individual crimes or to investigate the "'loan shark' or 'juice' racket" is not pursued before this court, and we need not be concerned with it.

Section 4 of the act relating to Rules and Regulations of State Agencies provides that every rule adopted by an agency shall be filed with the Secretary of State, and further ordains that no rule shall become effective less than ten days after a copy thereof has been so filed. In the present case the commission adopted certain rules on November 17, 1965, and filed them with the Secretary of State on November 22, 1965. As a consequence, defendants claim the resolution of the commission adopted on November 17, 1965, and all subpoenas served before December 5, 1965, the tenth day after the filing of the rules, were null and void and of no legal effect. This contention must fail on two grounds. First, the Illinois Crime Investigating Commission is a legislative commission, (*cf. Sweezy* v. *New Hampshire,* 354 U.S. 234, 1 L.Ed.2d 1311,) and section 1 of the Rules and Regulations Act by its express terms excludes legislative and judicial commissions from the ap-

plication of the act. (Hl. Rev. Stat. 1965, chap. 127, par. 263.) Second, the resolution of the commission and the subpoenas issued were not pursuant to the rules adopted, but were under the statutory authority conferred by sections 7 and 13 of the Illinois Crime Investigating Commission Act. (Ill. Rev. Stat. 1965, chap. 38, pars. 203—7 and 203—13.) Nothing in section 7 requires a resolution of the commission to be filed to give it validity, and the fact that it was not is of no consequence here.

In considering defendants' attack on the reasonableness of the demand and the relevance of the information sought, it is sufficient to point out that the subpoenas and the resolution attached thereto make it apparent that the defendants are being commanded to testify before the Illinois Crime Investigating Commission in reference to the " 'loan shark' or 'juice' racket", and we believe this adequate, particularly in view of the fact that no question is here raised as to the sufficiency of the terms "loan shark" and "juice racket" as describing the activities to be investigated.

Defendants urge that upon denial of their motion to dismiss, they should have been allowed to answer and raise, among other issues, the legality of the investigation, based on a claim that the commission was seeking to expose solely for the sake of exposure. In our judgment, however, the legality of the investigation, as well as the other elements properly considered on judicial review, may be raised by a motion to dismiss the petition for an enforcement order. Due process does not require that a party be given multiple opportunities to raise the same question, and when all matters properly reviewable may be raised and heard on a motion to dismiss, there exists no necessity for further pleadings. Defendants' failure to present all re-

viewable issues in its motion constituted a waiver of those not presented (*cf. People* v. *Irwin*, 32 Ill.2d 441), and the circuit court did not err in refusing to permit an answer to be filed.

The order of the circuit court of Cook County is affirmed and the cause remanded to that court to enable it to direct defendants' appearance before the commission on such future date as may be appropriate.

Order affirmed; cause remanded.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1967

NO. 293

FIORE BUCCIERI, FRANK BUCCIERI, CHRIS CARDI, DOMINICK CARZOLI, ARTHUR COWAN, JOSEPH GAGLIANO, JOSEPH GRIECO, PETER ORI, LENNY PATRICK, ALBERT SARNO, PATSY RICCIARDI and ANTHONY SPILOTRO,

Petitioners,

vs.

ILLINOIS CRIME INVESTIGATING COMMISSION,

Respondent.

(On Petition for a Writ of *Certiorari* to the Supreme Court of Illinois.)

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion is correctly printed as an Appendix to the Petition for Writ of Certiorari.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1) Whether it was incorrect for the Illinois Supreme Court to construe a state statute so as to avoid substantial doubts about the statute's constitutionality, by holding that the provisions thereof necessarily contemplated due notice and a hearing.

2) Whether defendants who appear generally before a court can thereafter contest the sufficiency of the notice given them.

3) Whether individuals, who have refused to honor administrative subpoenas, have a constitutional right to unlimited judicial review at the time when application is made for court enforcement of the subpoenas.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

These are adequately set forth in the Petition.

STATEMENT

Even though the petitioners' Statement of Facts is adequate, the Respondents would point out that the petitioners' "Motion to dismiss Action and strike Complaint" contained (in addition to those portions set forth in the Petition) challenges to the Commission's authority for bringing the enforcement action; challenges to the legal sufficiency of the resolution authorizing the hear-

ings; challenges to the Commission's authority to enact the resolution; challenges as to the effectiveness of the subpoenas; and a challenge as to the legal sufficiency of the petition seeking court enforcement of the subpoenas.

Many of these contentions were considered by the Illinois Supreme Court.

THE DECISION OF THE ILLINOIS SUPREME COURT IS CONSISTENT WITH APPLICABLE DECISIONS OF THIS COURT, AND NO NEW AND SUBSTANTIAL FEDERAL QUESTIONS ARE INVOLVED THEREIN.

Although the petitioners attempt to raise speculative and anticipatory questions, the decision of the Illinois Supreme Court stands for only three simple and well-settled propositions. Each of these three points will be discussed separately, with citation of cases wherein this Court has held similarly.

Point Decided: Fundamental rules of statutory construction require a holding that the Illinois Legislature, in enacting Section 13, necessarily contemplated and intended that orders to compel obedience to subpoenas issued by the Illinois Crime Commission could only be issued upon due notice and a hearing. (Petition, App. 4)

The decision by the Illinois Supreme Court is consistent with this Court's mandate that a statute should be interpreted in such a way as to free it from substantial constitutional doubts. [*E.g., Lynch* v. *Overholser,* 369 U.S. 705, 711 (1962)], and this Court itself has consistently sought interpretations which support the constitutionality of legislation. [*E.g., United States* v. *National Dairy Products Corp.,* 372 U.S. 29, 32 (1963)]. Further-

more, this Court has also read a statute as requiring notice although no such notice was expressly provided for, [See *American Power Co.* v. *Securities & Exchange Commission,* 329 U.S. 90 (1946)] The language contained in that opinion is directly applicable here:

> "Equally groundless is the contention that § 11 (b) (2) [of the Public Utility Holding Company Act] is void in the absence of an express provision for notice and opportunity for hearing as to security holders regarding proceedings under that section.
>
> • • • • • •
>
> "That the statute does not expressly insist upon what in fact has been given the security holders is without constitutional relevance under these circumstances. Whenever possible, statutes must be interpreted in accordance with constitutional principles. Here, in the absence of definite contrary indications, it is fair to assume that Congress desired that § 11 (b) (2) be lawfully executed by giving appropriate notice and opportunity for hearing to all those constitutionally entitled thereto." (Id. at 107, 108)

The petitioners apparently do not quarrel with the rule enunciated by the Illinois Supreme Court, *i.e.,* that due process requires that they be given notice and a hearing, but they ask this Court to hold that such a requirement must be express in the statute. No decisions of this Court justify petitioners' request.

In both *Southern Ry. Co.* v. *Virginia* (290 U.S. 190) and in *Coe* v. *Armour Fertilizer Works* (237 U.S. 413), which are cited by the petitioners, the state courts had held that the statutes construed did not require notice and an opportunity to be heard. By way of comparison, the Illinois Supreme Court has recognized that such are essential. This interpretation of the Illinois statute by the highest state court is as though written into the ordinance

itself. [*Poulos* v. *New Hampshire,* 345 U.S. 395, 402 (1953)]. Moreover, when this Court is dealing with the constitutionality of state statutes challenged under the 14th Amendment, it generally accepts the meaning thereof as construed by the highest state court. [*Farncomb* v. *Denver,* 252 U.S. 7, 10 (1920)] Under such circumstances, where the state court has recognized the requirements of due process, and where there is only a dispute over the court's technique of statutory construction, a grant of *certiorari* is not warranted.

Point Decided: By making a general appearance, defendants submitted to the jurisdiction of the court and waived the adequacy of the notice served upon them.

The ruling is again consistent with decisions of this Court, which since 1806 has uniformly held that when an individual appears generally before a court (for example, by contesting the sufficiency of the complaint), he waives all defects in service. [*E.g., Western Loan Co.* v. *Butte & Boston Min. Co.,* 210 U.S. 368, 372 (1907); *St. Louis & San Francisco Co.* v. *McBride,* 141 U.S. 127, 130 (1891); *Knox* v. *Summers,* 7 U.S. (3 Cranch) 496 (1806).]. While the petitioners raise the question of the sufficiency of mailed notice, the Illinois Supreme Court specifically said that "we do not reach that point in this case." (App. 4) The issue of the sufficiency of mailed notice and the other similar issues which the petitioners attempt to raise are speculative and anticipatory, and this Court has repeatedly declined to anticipate a question of constitutional law in advance of the necessity of deciding it. [*E.g., Bush* v. *Texas,* 372 U.S. 586, 590 (1963)] Moreover, this Court will not presume that the state court will construe and interpret statutes in an unconstitutional manner. [Cf. *Fox* v. *Washington,* 236 U.S. 273, 277 (1915)] In light of the foregoing principles, *certiorari* would not be warranted.

Point Decided: Judicial review of administrative subpoenas is limited to a consideration of the constitutionality of the statute, whether the contemplated agency proceedings are included within the statutory authority, the reasonableness of the demand and the relevancy of the information sought. (Petition, App. 5)

This ruling is based on decisions of this Court, and is in accord with the policy expressed in those cases—that although constitutional rights must be protected, an agency should not be hampered and forced to spend extensive time litigating in the courts before it can even commence the investigation. [See *United States* v. *Powell,* 379 U.S. 48, 54 (1964); *Oklahoma Press Pub. Co.* v. *Walling,* 327 U.S. 186, 213 (1946); *Endicott Johnson Corp.* v. *Perkins,* 317 U.S. 501, 509, 510 (1943)]. In the case at bar, the petitioners filed a motion to dismiss and, in the alternative, to strike the complaint in the trial court. In support of this motion, they relied upon (counting points and subpoints) twenty-three grounds. (Petitioners' Brief in Illinois Supreme Court, pp. 12-16) Eight of these grounds related to various alleged defects in the subpoenas. The most important of petitioners' contentions, including several challenges to the subpoenas, were considered by the Illinois Supreme Court, as falling within the permissive scope of judicial review. None of the matters now mentioned in the Petition, however, were included in that Motion, for possible consideration. No decision cited by petitioners gives them the right to thereafter raise such matters, nor does any constitutional provision give them the right to dictate the time of ju-

dicial review. The scope of review authorized by the Illinois Supreme Court protects petitioners' constitutional rights while it avoids unnecessary delays in such investigations, and the decision should not be overturned.

CONCLUSION

For the above reasons, the respondent respectfully asks that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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